MOTION FILED
JUL 21 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1335

VILLAGE OF SCHAUMBURG,
Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY, PUBLIC CITIZEN, NATIONAL ORGANIZATION OF WOMEN LEGAL DEFENSE AND EDUCATION FUND, NATIONAL BLACK UNITED FUND, AND NEW YORK PUBLIC INTEREST RESEARCH GROUP

DAVID C. VLADECK
ALAN B. MORRISON
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorneys for Amici Curiae

July 20, 1979

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	(ii)
MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*	(vii)
INTERESTS OF *AMICI*	(viii)
BRIEF OF *AMICI CURIAE*	1
INTERESTS OF *AMICI CURIAE*	1
CONSTITUTIONAL PROVISION AND MUNICIPAL REGULATION INVOLVED	1
QUESTION PRESENTED	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. THE PERCENTAGE-BASED PROVISION OF THE ORDINANCE BEARS NO RELATION TO ANY LEGITIMATE GOVERNMENTAL OBJECTIVE	9
II. THE ORDINANCE VIOLATES THE FUNDAMENTAL RIGHTS OF CHARITABLE ORGANIZATIONS, THEIR MEMBERS AND BENEFICIARIES, AND THE VILLAGE RESIDENTS	16
CONCLUSION	25

TABLE OF AUTHORITIES

Cases:	Page
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)	14
Bob Jones University v. Simon, 416 U.S. 725 (1974)	18
Buckley v. Valeo, 424 U.S. 1 (1976)	8, 11, 12, 16, 20
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)	23
Cantwell v. Connecticut, 310 U.S. 269 (1940)	8
Cohen v. California, 403 U.S. 15 (1971)	21
Elrod v. Burns, 427 U.S. 347 (1976)	8
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)	8, 12, 22, 23, 24
Healy v. James, 408 U.S. 169 (1972)	17
Hynes v. Mayor of Oradell, 425 U.S. 610 (1976)	8, 11, 13, 16
In Re Primus, 436 U.S. 412 (1978)	19
Kleindienst v. Mandel 408 U.S. 753 (1972)	16

Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977)	15, 19
Madison School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976)	23
Martin v. Struthers, 319 U.S. 141 (1943)	8, 9, 14, 17, 24
Mills v. Alabama, 384 U.S. 214 (1966)	24
NAACP v. Button, 371 U.S. 415 (1963)	8, 19, 21, 23
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	9, 21
Organization for a Better Austin v. Keefe 402 U.S. 415 (1971)	14
Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972)	21, 23
Procunier v. Martinez, 416 U.S. 396 (1974)	16, 17
Schneider v. State, 308 U.S. 147 (1939)	8, 14, 16
Shelton v. Tucker, 364 U.S. 479 (1960)	8
Spence v. Washington, 418 U.S. 411 (1974)	17
Street v. New York, 394 U.S. 576 (1969)	21
Talley v. California, 362 U.S. 60 (1960)	8

Thomas v. Collins,
323 U.S. 516 (1945) 6, 8

Thornhill v. Alabama,
310 U.S. 88 (1940) 24

United Mine Workers v. Illinois Bar Ass'n,
389 U.S. 217 (1967) 24

United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971) 24

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) 12, 16, 17, 19, 24

Whitney v. California,
274 U.S. 357 (1927) 15

Constitutional Provision:

First Amendment . . . . . *passim*

Statutes:

Internal Revenue Code of 1954:

26 U.S.C. § 501(c)(3) 13
26 U.S.C. § 501(c)(4) 13

Criminal Code:

18 U.S.C. § 1341 15

Legislative Materials:

Hearings on H.R. 41 before the Subcomm. on Postal Personnel and Modernization of the House Comm. on the Post Office and Civil Service, 95th Cong., 1st Sess. (1977) 15

Other Authorities:

A. Meiklejohn, POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE (1948) 21

Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1969) 8

W. Prosser, THE LAW OF TORTS (4th ed. 1971) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1335

VILLAGE OF SCHAUMBURG,

Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY, PUBLIC CITIZEN, NATIONAL ORGANIZATION OF WOMEN LEGAL DEFENSE AND EDUCATION FUND, NATIONAL BLACK UNITED FUND, AND NEW YORK PUBLIC INTEREST RESEARCH GROUP TO FILE A BRIEF *AMICUS CURIAE*

National Committee for Responsive Philanthropy, Public Citizen, National Organization of Women Legal Defense and Education Fund, National Black United Fund, and New York Public Interest Research Group hereby move the Court for leave to file the accompanying brief *amicus curiae* urging the Court to rule that any percentage-based limitations on the use of a charity's funds as a condition of being entitled to solicit contributions, is constitutionally impermissible.

INTERESTS OF *AMICI CURIAE*

Amici are a broad range of tax-exempt charitable, educational, and advocacy organizations whose ability to raise funds and promote their organizational objectives will be directly affected by the disposition of the present proceeding. Each *amicus* has a significant interest in ensuring that it is not subject to burdensome, content-based restrictions on its right to solicit funds, and each *amicus*, except for the National Committee for Responsive Philanthropy, would not qualify as a "charitable organization" under the definition in the ordinance challenged in this action since it does not meet the percentage requirement set forth in the ordinance. In addition, several *amici* have been accorded tax-exempt status under section 501(c)(4) of the Internal Revenue Code, rather than section 501(c)(3), and are thus automatically disqualified from soliciting as charitable organizations under the ordinance.

The National Committee for Responsive Philanthropy represents the interests of its members and other charitable organizations whose efforts are directed at social and political reform. Its members include groups involved in educational activity, health, social welfare, housing, neighborhood revitalization, civil rights, equal employment opportunities, and environmental protection. Although the Committee is funded primarily by foundation grants, some of its member organizations employ door-to-door solicitation to raise funds and promote their organizational objectives and have been granted tax-exempt status under section 501(c)(4) of the Internal Revenue Code.[1]

---

[1] The following organizations are members of the Committee: The Action Center; American Friends Service Committee; Association of Voluntary Action Scholars; Bay Area Committee for Responsive Philanthropy; Carolina Brown Lung Association; Catholic Charities; Center for Community Change; Center for Community Organizations, Center for Renewable Resources; Chicano Education Project; Children's Adoption Resource Exchange; The Children's Foundation; Clearinghouse for Community Based Free Standing Educational Institution; Cleveland Women's Counsel; Community Renewal Society; Consumer Federation of America; Council on Municipal Performance; Council for Public Interest Law; Designs for Change; East Harlem Council for Human Services; Emergency Land Fund; Environmental Policy Center. Foundation for Exceptional Children; Fund for Constitutional Government; The Grantsmanship Center; The Gray Panthers; Edward W. Hazen Foundation; Housing Conservation Coordinators; International Peoples Appeal; John D. Rockefeller 3rd Fund; Mountain Association for Community Economic Development Mujeres en Desarrollo; National Center for Urban Ethnic Affairs; National Conference of Puerto Rican Women; National Council of La Raza; National Gay Task Force; National Self-Help Resource Center; National Urban Fellows; National Women:s Education Fund; Native American Rights Fund; National Organization of Women Legal Defense and Education Fund; Philadelphia Committee for Responsive Philanthropy; Positive Futures; Puerto Rican Legal Defense and Education Fund; Social Action Service – Diocese of Amarillo; Southwest Alternatives Institute; The Support Center; The Youth Project; and National Rural Center.

Public Citizen is a non-profit organization involved in a wide variety of activities on behalf of consumers, including research on health and safety issues, lobbying for legislative reform, and litigation. Public Citizen employs a full-time staff of health professionals and attorneys to conduct these activities directly, and is supported by contributions from approximately 65,000 individuals annually. Although Public Citizen depends primarily on direct mail solicitation, it also relies on personal solicitation of private contributions.

The National Organization of Women ("NOW") Legal Defense and Educational Fund is a not-for-profit civil rights organization established to perform a wide range of legal and

educational services in support of efforts to eliminate sex-based discrimination. Among its activities are monitoring the enforcement of anti-discrimination laws, conducting research about sex-based discrimination, gathering and disseminating information about women's legal rights, and participating in law reform litigation. These programs to advance women's rights are supported largely by contributions from individuals solicited through direct mail and in-person appeals. NOW Legal Defense and Education Fund has found it necessary to develop a full time staff to directly carry out and expand its program. The organization's expenditures for staff, salaries, and the administrative expenses necessary to support the staff's activities are essential and directly related to achieving its charitable purposes.

The National Black United Fund and its thirteen affiliate organizations raise funds to assist local charitable groups involved in matters of particular concern to the Black community, such as urban development, job training, and establishing cultural and educational programs. Many of the Fund's affiliate organizations employ personal solicitation as a means of combining their fund-raising efforts with their educational objectives.

New York Public Interest Research Group ("NYPirg") is a non-profit organization with 150,000 members active in a broad range of consumer and environmental issues. NYPirg has a staff of over 100 persons, including scientists, health-care professionals, researchers, attorneys, and lobbyists. NYPirg depends on door-to-door solicitation as a major component of its educational efforts and as its primary means of raising funds. During fiscal year 1978, NYPirg raised over $450,000 from door-to-door solicitation.

The interests of *amici* in this case are the interests of charitable organizations and their members in establishing that the

right to engage in solicitation cannot be abridged solely because a municipality does not approve of the manner in which organizations seek to achieve their charitable purposes. *Amici* therefore seek a broad ruling from this Court declaring that the imposition of percentage requirements and other content-based restrictions as conditions of the right to engage in charitable solicitation violates the First Amendment. Because neither the brief of respondent nor that of the other *amicus*, Coalition of National Voluntary Organizations, *et al.*, addresses this case from this broad perspective, the accompanying brief will provide the Court with a different vantage point.

This case is of critical concern to *amici* for two further reasons. First, it concerns a *municipal* ordinance. While *amici* do not dispute that the government has an interest in protecting citizens from fraudulent solicitation practices, the limits of local regulation must be particularly narrow to ensure that charities are not burdened by multiple and inconsistent regulations. Appropriate disclosure requirements, as well as use of traditional criminal fraud statutes, can adequately serve to protect the public, and thus there is no necessity for extensive local regulation in this area.

Just as importantly, the rationale offered by petitioner to justify the ordinance challenged, if accepted by this Court, has broad implications. It might be used to justify imposition of comparable restrictions on other forms of solicitation, such as direct mail, which affect all charities since the limitation on the use of the money raised is unrelated to the solicitation method employed. Upholding such requirements would deal a crippling blow to most charitable organizations, including *amici*. For these reasons, *amici* are vitally concerned about this case, and submit that the presentation of their views in the accompanying brief will assist the Court in considering the important constitutional issues raised in this action from a different viewpoint

than that of the respondent, whose interest is primarily in sustaining the judgment below.

Amici sought the consent of the parties to the filing of this brief, but they were only able to secure permission of respondent.

Respectfully submitted,

ALAN B. MORRISON
DAVID C. VLADECK
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorneys for Amici Curiae
National Committee for
Responsive Philanthropy, *et al.*

July 20, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1335

VILLAGE OF SCHAUMBURG,
Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY, PUBLIC CITIZEN, NATIONAL ORGANIZATION OF WOMEN LEGAL DEFENSE AND EDUCATION FUND, NATIONAL BLACK UNITED FUND, AND NEW YORK PUBLIC INTEREST RESEARCH GROUP

INTERESTS OF *AMICI CURIAE*

The interests of *amici* are set out in the accompanying motion for leave to file this brief *amicus curiae.*

CONSTITUTIONAL PROVISION AND MUNICIPAL REGULATION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

The Village of Schaumburg Code, Chapter 22, Article III, Section 22-20, provides in pertinent part:

> Every charitable organization, which solicits or intends to solicit contributions from persons in the village by door-to-door solicitation or the use of public streets and public ways, shall prior to such solicitation apply for a permit. Said application shall be made to the village clerk and shall include the following information:
>
> * * *
>
> (f) Satisfactory proof that the organization is a tax exempt organization under the Internal Revenue Code of the United States, section 501(c)(3).
>
> (g) Satisfactory proof that at least seventy-five per cent of the proceeds of such solicitations will be used directly for the charitable purpose of the organization. For such purposes, the following items shall not be deemed to be used for the charitable purposes of the organization, to wit:
>
> (1) Salaries or commissions paid to solicitors;
>
> (2) Administrative expenses of the organization, including, but not limited to, salaries, attorneys' fees, rents, telephone, advertising expenses, contributions to other organizations and persons, except as a charitable contribution and related expenses incurred as administrative or overhead items.

> For the purpose of satisfying the requirements of subparagraph (g), the organization shall submit a certified audit of the last full year of operations, indicating the distribution of funds collected by the organization, or such other comparable evidence as may demonstrate the fact that at least seventy-five per cent of the funds collected are utilized directly and solely for the charitable purpose of the organization.

QUESTION PRESENTED

Does the First Amendment permit a municipality, under the guise of protecting residents from fraud, to impose burdensome restrictions upon door-to-door solicitation of funds by a charitable organization solely because the municipality does not approve of the uses which the organization makes of its funds in seeking to achieve its charitable purposes?

STATEMENT OF THE CASE

Respondent Citizens for a Better Environment ("CBE") is an organization engaged in research and advocacy on environmental issues, particularly those affecting the State of Illinois. Like many organizations concerned with regional and local issues, CBE depends heavily on contributions from individual citizens for financial support. CBE is registered and in good standing with the Illinois Charitable Trust Division, and is recognized by the federal government as a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). Nonetheless, in order to raise funds and engage in its educational activities in the Village of Schaumburg, Illinois (the "Village" or "petitioner"), CBE first had to obtain permission from the Village. Petitioner denied CBE a permit under an ordinance which requires that a "charitable organization" must demonstrate not only that it is a tax-exempt organization under section 501(c)

(3), but also that at least 75 percent of its funds be used directly for the "charitable purposes of the organization." Specifically excluded from the definition of "charitable purposes" are funds expended for staff salaries, overhead, attorneys' fees, advertising, and salaries or commissions paid to solicitors. Thus, the only type of charitable organizations which can meet the Village's rigorous standards are the most traditional charitable organizations which simply channel money to other charities or directly to their intended beneficiaries. Organizations whose staffs directly deliver social services, engage in advocacy, or provide public education cannot qualify as charitable organizations under the Village's ordinance.

Having been denied a solicitation permit, CBE brought this action challenging the constitutionality of the percentage requirement under the First Amendment. Consistent with CBE's position, the district court held that the percentage requirement constituted censorship and impermissibly restrained the exercise of First Amendment freedoms. The court further found that the Village had no compelling interest in prescribing such a test and, accordingly, struck down the percentage requirement as "void and unconstitutional on its face." (Petition for Writ of Certiorari, Appendix B, B-4).

The court of appeals affirmed the district court's ruling, although apparently on narrower grounds. The court rejected the Village's contention that the percentage requirement was reasonably related to its asserted interest in protecting residents from fraud. (Petition for Writ of Certiorari, Appendix A, A-7). It emphasized that although the prevention of fraud is a valid governmental interest, the percentage requirement is not a sufficiently narrow solution because it prohibits or unduly burdens solicitation by organizations which devote large portions of their resources to

gathering and disseminating information or to other means of directly promoting their objectives. (*Id.*, at A-9 to A-11). The court concluded that even if the percentage requirement was designed to protect against fraud, it was not directly related to that purpose and narrowly fashioned to achieve it with minimum interference with First Amendment rights. (*Id.*)[1]

Despite the defects it found in the ordinance, the court limited the reach of its holding to research and advocacy organizations like CBE which combine education of the public with fund-raising activities. With respect to other types of charitable organizations, the court declined to hold that the percentage requirement was invalid on its face. (*Id.*, at A-10). In so ruling, the court did not explain the basis for its differentiation among types of charitable groups or its implicit conclusion that there is some correlation between the potential for fraud and the type of organization involved. Instead, the court left open the question of whether a more narrowly drawn ordinance containing a percentage restriction could pass constitutional muster in any of three cases: "where salaries paid are so large in relation to the services provided that the organization is actually a for-profit venture," where "the funds collected will be used for purposes other than those expressly or impliedly represented," or where the solicitors are "mere conduits for contributions." (*Id.*). Under those circumstances, the court suggested that a narrow ordinance might

---

[1] The court of appeals also found that several key provisions of the ordinance, most notably the definition of a charitable organization, were fatally vague. *Amici* agree with the court of appeals that the ordinance is too vague to meet constitutional standards. However, because the court below fully addressed the vagueness issue, we will not discuss that issue.

be found to be reasonably related to the stated governmental goal of preventing fraud.

SUMMARY OF ARGUMENT

This case presents the question whether a municipality may, consistent with the First Amendment, impose burdensome restrictions on door-to-door solicitation of funds by a charitable organization solely because the municipality does not approve of the manner in which the organization seeks to advance its charitable purposes. Under the guise of seeking to protect its residents from fraud, the Village of Schaumburg, like many other municipalities and local governments, has enacted an ordinance which requires that to obtain a permit to solicit door-to-door, charitable and non-profit organizations must establish that at least 75 percent of the funds raised are used in the way which the Village considers appropriate. Organizations that do not meet the percentage requirement are either barred from soliciting funds or are compelled to solicit under the Village's far more onerous regulations governing solicitation by "for-profit" entities.

Because both the solicitation of funds and the underlying activities of CBE are protected by the First Amendment, the ordinance can be sustained only if it is narrowly drawn to meet a compelling state interest and is the least restrictive alternative. *Thomas v. Collins*, 323 U.S. 516, 540-41 (1945). As the courts below correctly found, the Village's percentage requirement is unconstitutional because it does not serve the stated governmental goal of protecting Village residents from fraud. Fraud is not involved in this case because there is no misrepresentation of the use to which the solicited funds will

be put. Instead, the Village simply believes that it would be better public policy to have charities funnel this money directly to beneficiaries or to other charities rather than engage in the activities themselves. Any confusion that Village residents may have about whether a soliciting organization is using the money for charitable purposes or to line the pockets of its sponsors can be dealt with by narrow disclosure statutes rather than by the heavy penalties imposed by this ordinance.

Percentage restrictions are also offensive because they violate the basic First Amendment principle that the government may not regulate the content of speech. Rather than being content-neutral, the sole function of a percentage-based regulation is to regulate content. By distinguishing among organizations on the basis of their activities, the Village is in essence promoting the speech of those charities which act as conduits to channel funds to worthwhile endeavors, while prohibiting or interfering with the speech of charities which directly engage in such activities. Accordingly, any percentage-based regulation plainly conflicts with fundamental First Amendment associational and free speech rights.

There are two further reasons this Court should find percentage requirements imposed by municipalities unconstitutional. First, it must be emphasized that this is a *municipal* ordinance. While *amici* concede that the government has an interest in protecting citizens from fraud, the limits of municipal regulation must be particularly narrow to avoid subjecting organizations to multiple and inevitably inconsistent local requirements. Just as importantly, if this Court adopts the narrow ruling of the court of appeals, the percentage requirement challenged here may well be imposed on other types of solicitations, such as direct mail, since the potential for "fraud" as seen by petitioner is no different there than in the context of door-to-door fund-raising. Such restrictions would deal a crippling blow to most charities, particularly

multi-jurisdictional ones, and would seriously undermine the federal policy embodied in the Internal Revenue Code of encouraging Americans to support the charity of their choice, not the government's.

ARGUMENT

There can be no dispute that canvassing and door-to-door solicitation are protected First Amendment activities. *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976); *Thomas v. Collins*, 323 U.S. 516 (1945); *Martin v. Struthers*, 319 U.S. 141 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939). Accordingly, attempts by municipalities to restrict the right to engage in door-to-door solicitation are unconstitutional unless they can survive the "exacting scrutiny" required by the First Amendment. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978). Petitioner must therefore shoulder the burden of proving that its restrictions on solicitation are both closely related to the advancement of a compelling governmental interest and are narrowly drawn "in such a manner as not to intrude upon the rights of free speech and free assembly." *Hynes v. Mayor of Oradell, supra*, 425 U.S. at 616, *quoting, Thomas v. Collins, supra*, 323 U.S. at 540-41. *See also Elrod v. Burns*, 427 U.S. 347, 362-63 (1976); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *NAACP v. Button*, 371 U.S. 415, 438-39 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Talley v. California*, 362 U.S. 60, 62-64 (1960); *see generally* Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1969).

The percentage requirements contained in petitioner's ordinance do not further the stated governmental interest in preventing fraud. Rather, they serve to differentiate among charitable organizations solely on the basis of the way an

organization uses its funds to advance its objectives, thereby affecting the form and content of the organization's activities. Thus, the percentage-based requirement at issue in this case is a classic example of content-based regulation and, accordingly, is constitutionally impermissible.

I. THE PERCENTAGE-BASED PROVISION OF THE ORDINANCE BEARS NO RELATION TO ANY LEGITIMATE GOVERNMENTAL OBJECTIVE.

Charitable organizations employ a wide range of methods in raising funds. Some depend on mail solicitations, telephone campaigns, and advertising. Others rely primarily on handbills and door-to-door solicitation. Even raffles and church-sponsored bake sales are used to raise money. Each method has its advantages and disadvantages, and each carries with it different risks, benefits, and costs to the organization. The choice of which methods to use is necessarily influenced by such factors as out-of-pocket expenses and the likely return. But among the most determinative factors are those that relate to the nature of the organization and its objectives. An organization whose purpose is to raise money for little league uniforms is not likely to solicit by direct mail or by advertising for contributions in *The New York Times*. On the other hand, broad-based organizations seeking to disseminate information often will choose such methods to solicit contributions. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). For a local or regional group whose principal goals include educating the public and generating broad-based support for its political or social objectives, direct personal solicitation is frequently a preferred method of raising money because it allows the coupling of fund-raising efforts with its charitable endeavors. *Cf. Martin v. Struthers, supra*, 319 U.S. at 145-46.

While each method of soliciting funds may also pose some risks to society, the government can safeguard the

public in a number of ways. Subject to constitutional limitations, governmental entities can require permits, registration, disclosure, filings, or, where the perceived danger to the public is substantial, impose restraints or prohibit some activities entirely. Each of these modes has a specific purpose and effect, and each necessarily results in intrusions into the activities of the organizations involved.

The Village of Schaumburg argues that its ordinance furthers two compelling governmental interests: protecting the physical safety of its residents and preventing fraud. (Petitioner's Brief, at 27, 28-33) ("Pet. Br."). However, any nexus that exists between the percentage-based regulation at issue and the stated justifications is too tenuous to withstand scrutiny under the First Amendment.

With respect to the protection of the physical safety of Village residents, the restriction is fatally indirect and speculative. Indeed, the Village has not suggested that door-to-door solicitation by fund-raisers for charities that do not meet the 75 percent requirement is particularly fraught with dangers to citizen safety or that assaults are more likely to be committed by such solicitors. Nor does logic or common sense suggest that this is the case. If the Village is genuinely interested in protecting the physical safety of its citizens, it should enforce, and if necessary modify, the many other provisions that have already been enacted toward that end. For example, section 22-23 of the Village's ordinance prohibits indicted or convicted felons from being used as solicitors, and section 22-24 prohibits solicitation during the evening. Each of these provisions is tailored with relative precision towards assuring the public's safety. But it is evident that the percentage requirement does not similarly advance that interest: there is simply no correlation between the conduct of the solicitors and the percentage disbursement of the organization's funds.

The Village also claims that the percentage requirement is "intimately related" to the permissible goal of protecting its residents from fraudulent solicitation practices. (Pet. Br. at 29). The Village insists that in instances where "a majority of the funds are utilized not for the charitable purposes for which the organization is purportedly organized, but instead to compensate canvassers, officers, and employees, it must be concluded that what is involved is nothing more or less than a commercial enterprise even though it be dressed in the trappings of a charitable or environmental purpose." (*Id.*) According to the Village, the ordinance protects against this perceived abuse by stimulating citizen inquiry. That is, if the citizen asks the solicitor whether he or she has received a permit from the municipality, the citizen knows immediately whether the solicitor represents a charitable organization or is involved in either a commercial or fraudulent enterprise. (*Id.*).[2]

The Village's contention that the percentage requirement is designed to protect against fraud is unpersuasive as a matter of logic and constitutionally insufficient to sustain the restrictions imposed. The gravamen of fraud is inducing someone to act on the basis of misinformation. Prosser, THE LAW OF TORTS 683-88 (4th ed. 1971). However, the ordinance does nothing to ensure that residents are not misled or deceived by solicitors. Rather, the ordinance em-

---

[2] Since petitioner's ordinance does not require solicitors to actually carry permits or provide proof of identity or organizational affiliation upon request, the requirements can easily be evaded, and thus they are indistinguishable from those struck down in *Hynes v. Mayor of Oradell, supra.* As Mr. Justice Brennan observed in his concurring opinion in *Hynes*, ". . . the requirement can hardly be justified as protective of overriding governmental interests since evasion can easily thwart that objective." 425 U.S. at 629. *See also Buckley v. Valeo, supra,* 424 U.S. at 45.

bodies the illogical and unsupported judgment that an organization which is primarily engaged in research or advocacy, or otherwise fails to comply with the Village's definitional rules, is not a "charitable organization" and that allowing such an organization to identify itself as "nonprofit" or "charitable" is likely to result in fraud. Based on this judgment alone, the ordinance bars such organizations from soliciting, or forces them to accept the "for-profit" label and to proceed under more stringent rules. Moreover, although the obvious means of combatting fraud is to require the disclosure of information, the percentage requirement provides no information to a citizen about whether an organization meets his or her particular criteria for contributing, or engages in the types of activities that he or she deems to be "charitable" or worthwhile. Rather, it proscribes solicitation solely on the basis of an arbitrary percentage.[3]

Even if the Village were correct in claiming that the percentage requirement had some correlation to its stated purpose of preventing fraud, the ordinance would still be unconstitutional because of the way it defines what constitutes a charitable organization. As noted above, in order to survive the "exacting scrutiny" applied in this area, any re-

---

[3] Even if the unsupported assumption that the percentage requirement will reduce the likelihood of fraud in door-to-door solicitation were true, the justification is far from compelling. Indeed, it is no more substantial than the support mustered for a number of other restrictions on speech which this Court has struck down in recent years. *See, e.g., First National Bank of Boston v. Bellotti, supra* (interest in preserving the integrity of the electoral process); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976) (interest in maintaining high professional standards among pharmacists); *Buckley v. Valeo, supra* (interest in preserving integrity of electoral process).

striction must be closely tailored to the governmental interest to minimize interference with First Amendment rights. *Hynes v. Mayor of Oradell, supra,* 425 U.S. at 616. Yet petitioner's ordinance is extreme in its breadth. The arbitrary 75 percent restriction ensures that all but the most traditional charitable organizations fall outside the sweep of the ordinance's definition of "charitable organization." Charitable groups which engage in research of any kind, including scientific and medical research, or have as their primary purpose the promotion of a social or political goal, cannot qualify. Nor can organizations qualify if they devote more than 25 percent of their resources to litigation or informing and educating the public through advertising. Thus, for example, *amicus* National Organization of Women Legal Defense and Education Fund would be excluded, since far more than 25 percent of its resources are devoted to these activities. Indeed, even not-for-profit hospitals would not qualify, since virtually all of their expenditures are for "salaries" and "overhead."

Further limiting the type of organization which can qualify is the ordinance's requirement that only organizations which have been granted tax-exempt status under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501 (c)(3), may solicit as charitable organizations. By so providing, the Village is excluding a broad range of recognized non-profit and charitable organizations. For example, organizations covered by section 501(c)(4) include charitable organizations "operated exclusively for the promotion of social welfare." Yet these organizations, which run the gamut from organizations seeking to reform social and political injustice through legislative efforts, such as *amicus* New York Public Interest Research Group, to community groups raising money for children's recreational facilities, like the organizations sponsored by *amicus* National Black United Fund, are

as deserving of public support as many or all of the organizations qualifying under the Village's ordinance. Nonetheless, they are categorically prohibited from soliciting funds in the Village as charitable organizations. Accordingly, even assuming that in some instances the percentage restriction could serve the stated governmental interest in preventing fraud, it is apparent that the restriction is far from closely tailored to achieve that goal. This defect alone is fatal.[4]

This Court, in the seminal decision of *Schneider v. State*, 308 U.S. 147 (1939), invalidated a ban on door-to-door canvassing and street distribution of circulars on the ground that, although the regulations bore some relation to the legitimate governmental interests in minimizing litter, noise, and traffic congestion and in guarding against fraud, these objectives could be achieved by less draconian measures. *Id.* at 164. *See also Martin v. Struthers*, 319 U.S. 141, 148 (1943). The same is true here. The claim of potential fraud raised by the Village – that residents may be induced into contributing to essentially for-profit organizations posing as charities – can be met directly through the enactment and enforcement of disclosure rules. Arming citizens with the information they need to assess whether the organization is worthy of contributions is surely a far more direct and far

[4] Because the ordinance flatly prohibits, or at least seriously interferes with, protected First Amendment activities, it also constitutes a forbidden prior restraint. This Court has repeatedly held that any system of prior restraint bears a heavy presumption against its constitutionality, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), and that the government carries a heavy burden in justifying the imposition of any restraint. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). In this case, the Village has alleged only that the restraint is needed to avert the possibility of fraud resulting from allowing charitable organizations not meeting its definition to solicit funds. Such speculation cannot overcome the heavy presumption against prior restraint.

less intrusive method of protecting against fraud than the Village's total prohibition on solicitation by organizations that do not meet the percentage restriction. As this Court long ago observed: "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *quoted in Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 (1977).[5]

[5] *Amici* do not suggest that the Village itself may impose disclosure requirements. While the prevention of fraud is an important governmental interest, it should be dealt with at the federal or perhaps state level to ensure that national and regional organizations are not subject to inconsistent and burdensome local requirements.

The Village's argument also overlooks the fact that the State of Illinois has specifically undertaken to protect its residents from fraud by requiring disclosure of this kind of information. Like most states, Illinois requires that charitable and non-profit organizations intending to solicit funds must file certified annual audits and other reports. The intent underlying the Illinois statute is precisely that offered by the Village to justify its percentage restrictions – protecting the public from fraud by essentially for-profit organizations posing as charities.

Similarly, the federal government also regulates in this area both to prevent fraud and to provide subsidies through the tax laws to socially useful organizations. In order to qualify as tax-exempt, organizations must file financial reports and other information demonstrating their charitable nature. Thus, the Village is seeking to have its judgment of what constitutes a charitable purpose supersede that of both the federal and state governments. The federal government has also undertaken to protect citizens from fraudulent mail solicitation practices. 18 U.S.C. § 1341. In addition, Congress has conducted hearings to look into whether more rigorous regulation is needed in this area, though to date it has not enacted any legislation. *See* Hearings on H.R. 41 before the Subcomm. on Postal Personnel and Modernization of the House Comm. on the Post Office and Civil Service, 95th Cong., 1st Sess. (1977).

II. THE ORDINANCE VIOLATES THE FUNDAMENTAL RIGHTS OF CHARITABLE ORGANIZATIONS, THEIR MEMBERS AND BENEFICIARIES, AND THE VILLAGE RESIDENTS.

The constitutional defects inherent in the percentage requirement become even more apparent when arrayed against the constitutionally protected rights it infringes. First, the requirement abridges the First Amendment free speech rights of the organizations and the Village residents. In addition to an organization's right to make public its viewpoint and to engage in solicitation and canvasssing, *see, e.g., Hynes v. Mayor of Oradell, supra,* 425 U.S. at 616, the Village residents have an independent and equally compelling right to receive information and to make informed choices based on such information. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* 425 U.S. at 756-57 (the First Amendment affords protection "to the communication, to its source and to its recipients both"). *Procunier v. Martinez,* 416 U.S. 396, 408-09 (1974); *Kleindienst v. Mandel,* 408 U.S. 753, 762-63 (1972).

This Court has repeatedly recognized "that door-to-door solicitation and canvassing is a method of communication essential to the preservation of our free society." *Hynes v. Mayor of Oradell, supra,* 425 U.S. at 624 (Brennan, J., concurring). In a similar vein, in *Schneider v. State,* 308 U.S. 147, 164 (1939), the Court observed that:

> [P]amphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people.

The Court echoed this sentiment in *Martin v. Struthers, supra,* 319 U.S. at 145-46, where Mr. Justice Black, speaking for the Court, noted "[d]oor to door distribution of circulars is essential to the poorly financed causes of the little people." *See also Buckley v. Valeo, supra,* 424 U.S. at 19. Yet despite this historic concern for protecting direct, personal communication, the Village ordinance prohibits many charitable groups from engaging in this form of communication if they seek to raise funds at the same time.

One of the particularly anomalous features of the ordinance is that the Village arrogates to itself the power to discriminate against organizations which the federal government has recognized are valid charitable organizations and are worthy of public support by granting them tax-exempt status. Through the percentage requirement, the Village is seeking to discourage activities that the federal government is seeking to promote by way of tax subsidies. Thus, the Village has effectively taken upon itself the role of final arbiter of what activities are charitable, even though its definition plainly conflicts with that of the federal government.

In the court below the Village contended that organizations failing to qualify under its definition of charitable organizations may at least *apply* for a permit to solicit under the more stringent "for-profit" standards. (Petition for a Writ of Certiorari, Appendix A, at A-9, n.6). There are several serious flaws in this approach, however. First, this Court has rejected precisely this argument – *i.e.*, that there is no abridgement when there are alternative channels available to the speaker and listener – in a number of cases. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* 425 U.S. at 757 n.15; *Spence v. Washington,* 418 U.S. 405, 411 n.4 (1974); *Healy v. James,* 408 U.S. 169, 183 (1972); *see also Procunier v. Martinez, supra,* 416

U.S. at 408-409. Moreover, the ordinance does not make it clear whether a charitable group that does not qualify as a "charitable organization" under the ordinance is allowed to proceed under the provisions concerning for-profit concerns. Indeed, even the Village is not sure. (Petition for a Writ of Certiorari, Appendix A, at A-9, n.6).

The Village's argument also ignores the fact that the consequences of being denied the right to solicit door-to-door or having to proceed as a "for-profit" concern are considerable. An outright prohibition on direct, in-person solicitation poses a serious dnager to the continued financial viability of many charitable organizations whose objectives are to promote local or regional concerns. That danger is only marginally reduced if they are foreced to proceed as for-profit concerns. Petitioner's for-profit solicitation regulations are far more onerous than those for charitable organizations. For example, for-profit concerns are subject to far more rigorous filing requirements, *see* section 22-8, may be investigated to determine the moral character and reputation of their solicitors, *see* section 22-9, and may be forced to wait up to thirty days for the issuance of a permit. *Id.* Thus, having to proceed under the Village's "for-profit" rules significantly increases the burdens on non-qualifying organizations. More importantly, being labeled as a "for-profit" organization places a charity at a tremendous disadvantage in competing for contributions with groups petitioner calls "charitable organizations." *Cf. Bob Jones University v. Simon*, 416 U.S. 725, 729-30 (1974). In fact, compelling organizations which have been recognized as charitable by the federal or state government to proceed as for-profit organizations can lead to precisely the misunderstanding the Village states it is trying to protect against. Accordingly, the Village's claim that the possibility that non-qualifying charitable organizations can proceed under the for-profit

provisions of the ordinance is without foundation in law or in fact and should thus be rejected.[6]

The ordinance is also constitutionally infirm because it interferes with protected associational rights. In effect, the ordinance tells all groups seeking to solicit as charities that they must operate in the manner that the Village dictates – spending money in the way that the Village deems "charitable" and avoiding activities, such as research or other worthwhile endeavors conducted by its staff, litigation, and advertising, that petitioner considers inappropriate. The Village therefore seeks to stand almost as a super board of directors, directing the organization's spending, structure, and indeed its objectives, to those activities the Village prefers. Failure to heed the Village's instructions results in a denial of a charitable solicitation permit.

As Mr. Justice Harlan noted in his dissent in *NAACP v. Button, supra*, 371 U.S. at 452-53, "[f]reedom of expression embraces more than the right of the individual to

---

[6] A related, equally serious flaw stems from the assumption underlying the percentage restriction that organizations which do not meet the ordinance's definition of "charitable" are therefore "commercial" in nature. Based on this assumption, the Village contends that non-qualifying organizations are not entitled to the full panoply of constitutional protections and that it may rightfully prohibit such "commercial" entities from soliciting. (Pet. Br. at 29). Such a restricted view of the scope of First Amendment protection cannot be sustained in light of this Court's recent opinions emphasizing that First Amendment protection does not depend on the speaker, but rather on the nature of the communication. *In re Primus*, 436 U.S. 412, 438 (1978); *Linmark Associates, Inc. v. Township of Willingboro, supra*, 431 U.S. at 91-93; *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, supra*, 425 U.S. at 761-64. No longer can a governmental unit justify restraining speech simply by tarring it with the label "commercial speech."

speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective . . . ." The ordinance also seriously infringes that right. Organizations such as CBE and *amici*, which are constituted to promote consumer, environmental, and other social interests directly, are likely to expend the bulk of their funds to employ staff, to engage attorneys to seek legal redress, and to spend money on advertising to promote their cause. Yet it is precisely these organizations which are prohibited from soliciting for funds, thereby barring them from raising money to support their efforts, and chilling them from disseminating information and enlisting public support.[7]

Although arguably aimed at the way charities use their funds, the ordinance inevitably affects the content of the organization's objectives and activities, thereby violating another right of CBE and others. It is firmly rooted in the history of the First Amendment that, absent the most extraordinary circumstances, the "government has no power to restrict expression because of its message, its ideas, its

[7] In this regard, the ordinance plainly conflicts with the admonition of the Court in *Buckley v. Valeo, supra.* There this Court invalidated limitations on expenditures for political activities as violative of the First Amendment, cautioning that:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government but the people – individually as citizens and candidates and collectively as associations and political committees – who must retain control over the quantity and range of debate on public issues in a political campaign.

424 U.S. at 57.

subject matter, or its content." *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). *See also Cohen v. California*, 403 U.S. 15, 24 (1971); *Street v. New York*, 394 U.S. 576 (1969); *New York Times Co. v. Sullivan, supra*, 376 U.S. at 269-70; *NAACP v. Button, supra*, 371 U.S. at 445. This Court has often warned that any restriction on expressive activity because of content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times Co. v. Sullivan, supra*, 376 U.S. at 270. This Court recently amplified this basic constitutional precept:

> [The government] . . . may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and the government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by public groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusion from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Police Department of the City of Chicago v. Mosley, supra, 408 U.S. at 96, *citing* A. Meiklejohn, POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE 27 (1948). Since canvassing and door-to-door solicitation are protected forms of expression, restrictions on these activities can only be upheld if they are neutral in their impact on content.

Rather than being content-neutral, the sole function of a percentage-based regulation is to regulate content. By dis-

tinguishing among organizations on the basis of the type of activities in which they are engaged, the Village is in essence promoting the speech of those more traditional charities, which merely act as conduits to transfer funds to other charities, while prohibiting or interfering with the speech of those charitable organizations such as CBE and *amici* which directly engage in research, litigation, lobbying, and other charitable and educational activities. This broad distinction is based only on content. Indeed, the Village concedes that the percentage requirements are based on content, though it casts the distinction as one between truly charitable organizations and those which are actually commercial in nature. (Pet. Br., at 29).

Underscoring the fact that the ordinance regulates content is that it specifically excludes funds expended for attorneys' fees and advertising as legitimate components of an organization's charitable efforts. The Village offers no explantion of how these exclusions bear any relation to, much less further, the stated purpose of preventing fraud. Nor can any plausible explantion be discerned. On the contrary, it is evident that the exclusions are intended solely to prohibit organizations which are significantly and routinely engaged in litigation, research, and the public dissemination of information from soliciting for funds in the Village. The Village is thus acting as a censor, dictating the acceptable bounds of content to organizations desiring to solicit. The unambiguous message carried by the percentage requirement is that unless the organization confines its activities and the degree to which it engages in them to the ordinance's strict specifications, it will be barred from soliciting funds in the Village. In this respect, the ordinance suffers from the same defects found in the restrictions on political advertising by corporations which were struck down in *First National Bank of Boston v.*

Bellotti, supra, 435 U.S. at 785, on the ground that they impermissibly dictated the bounds of speech. In so ruling, this Court noted:

> If a legislature may direct business corporations to "stick to business," it also may limit other corporations – religious, charitable, or civic – to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment.

Nor is the ordinance different in effect from that invalidated in *Police Department of the City of Chicago v. Mosley, supra.* There this Court struck down a general ban on picketing near schools since it excepted labor picketing. thereby unconstitutionally discriminating among pickets on the basis of their message. Just as in *Mosley*, the ordinance challenged here plainly discriminates among organizations on the basis of their message and therefore is unconstitutional. *See also Madison School Dist. v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 176 (1976).

The fact that the Village has chosen an organization's involvement in litigation and advertising as criteria for disqualification heightens its offensiveness. It is firmly established that the right to engage in litigation is protected by the First Amendment, both as a means of petitioning the government for redress of grievances, *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972), and as an important component of the right of association. *NAACP v. Button, supra,* 371 U.S. at 430. Accordingly, this Court has consistently struck down as offensive to the First Amendment state attempts to interfere with the right to seek redress in the courts. *See, e.g., United Transportation Union v. State Bar of Michigan,*

401 U.S. 576, 585 (1971); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222-23 (1967).

Similarly, this Court has recently emphasized that the right to engage in advertising to promote political or social goals is deserving of the full range of First Amendment protections. *First National Bank of Boston v. Bellotti, supra*, 435 U.S. at 776. *See also Thornhill v. Alabama*, 310 U.S. 88,101-102 (1940); *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra*, 425 U.S. at 764. Yet petitioner's ordinance directly and seriously impinges on both of these rights, without any demonstration whatsoever that the restrictions are necessary to further any compelling interest.

The ultimate conclusion flowing from this discussion is that petitioner is seeking to decide for all its residents what activities are and are not charitable. On the basis of this judgment, petitioner prohibits or imposes burdensome requirements on the activities of organizations it considers not to be charitable. Under the First Amendment, such content-based governmental interference with the speech and associational activities of organizations such as CBE and *amici* is forbidden, even when the purported goal of the government is the desire to prevent what it sees as fraud. The fact that the solicitation here is conducted by door-to-door canvassing rather than by mail or telephone is irrelevant to the ends that petitioner seeks to achieve. Indeed, the fact that there are requirements related to prevention of fraud imposed by federal and state authorities makes the burden imposed by the ordinance even less justifiable. Petitioner has failed to come forward with any ground for sustaining this serious intrusion on the First Amendment activities of lawful charities, much less a compelling reason. Nor has

petitioner shown that its ordinance is the least restrictive alternative available. Accordingly, this Court should rule that the percentage restriction in petitioner's ordinance is invalid on its face and should be permanently enjoined.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

DAVID C. VLADECK
ALAN B. MORRISON

Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Amici Curiae
National Committee for Responsive Philanthropy, *et al.*

July 20, 1979